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NO. 444

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

CITY OF ERLANGER, KENTUCKY,
Petitioner,

v.

RAYMOND J. BERKEMEYER,
THE WEIL, ROTH & IRVING COMPANY,
JOHN D. EXTERKAMP,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit and Brief in Support Thereof

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October 27, 1953.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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To the Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner respectfully shows:

I.

SUMMARY STATEMENT OF THE MATTER

1. Raymond J. Berkemeyer (hereinafter Berkemeyer sought a judgment against Erlanger on certain United States District Court for the Eastern District of Kentucky against Petitioner, the City of Erlanger, Kentucky, (hereinafter Erlanger). Tr. 1. Berkemeyer) (respondent herein) brought this action in the

sewer revenue bonds and the appointment of a receiver to operate Erlanger's sewer system and apply the revenues therefrom to payment of the bonds. Tr. 6-7.

2. Through an Amended Complaint The Weil, Roth and Irving Company (hereinafter Weil-Roth) (respondent herein) became a party plaintiff, stating that Berkemeyer was merely the nominal owner of the bonds for the purpose of the action and that Weil-Roth was the beneficial owner thereof. Tr. 28, 32.

3. John D. Exterkamp (hereinafter Exterkamp), one of respondents herein, intervened in the action, alleging that he was the owner of five of the bonds and praying for judgment against Erlanger. Tr. 44-51.

4. In its Answers to the Amended Complaint and an Amended Intervening Petition, Erlanger asserted its defense that bonds had been delivered and put into circulation unlawfully, illegally and without Erlanger's authority and were therefore wholly void. Tr. 36-38, 51-52.

5. The trial was by the Court without a jury. Tr. 61. Erlanger contended that the bonds were wholly void because Erlanger (a) never authorized their delivery, and (b) never received any consideration whatsoever for their issuance.

6. The bonds, by their terms, were payable exclusively out of the revenue to be derived from the operation of Erlanger's sanitary sewer system (P. Ex. 1, Tr. 79, 263), and under the Negotiable Instruments Law of Kentucky were non-negotiable instruments because they were not unconditional promises to pay

within the provisions of that law (Carroll's Ky. Stats. (1936) §§3720b-1, 3720b-3) (App., pp. 27-28, *infra*). Hence, under Kentucky decisions, the provisions of the Negotiable Instruments Law had no application to the bonds. The bonds were authorized under a Kentucky statute (Carroll's Ky. Stats. (1936) §2741L) (App., pp. 27-28, *infra*) which assigned to those bonds when in the hands of bona fide holders "all the qualities of negotiable instruments *under the law merchant.*"*

7. Under Kentucky law the legislative body of Erlanger, a city of the sixth class, was required to keep a record of its proceedings (Carroll's Ky. Stats. (1936) §3698), and Erlanger could speak only through and be bound only by that record (Tr. 499). The bonds could have been validly delivered and put in circulation only through authority granted by Erlanger's legislative body. Carroll's Ky. Stats. (1936) §2741L-5. The records of Erlanger's legislative body show conclusively that delivery of the bonds sued on was never authorized by that body. Tr. 98-99.

8. Despite the fact that Erlanger's records conclusively showed that Erlanger had *not* authorized delivery of the bonds sued on, the District Court (a) found that Erlanger had authorized delivery of the bonds (Tr. 469, 476-77), (b) entered judgment in favor of Exterkamp (Tr. 472) and of Weil-Roth (Tr. 482), and (c) appointed a receiver to take exclusive control of, manage and operate Erlanger's sewer system (Tr. 485-488).

*Emphasis supplied here and elsewhere in Petition and Brief, unless otherwise indicated.

9. On appeal by Erlanger to the United States Court of Appeals for the Sixth Circuit (Tr. 488), that Court held (a) that the bonds were not negotiable instruments under the Negotiable Instruments Law of Kentucky; (b) that the City had never authorized delivery of the bonds sued on; and (c) that while the bonds were not negotiable instruments under the Negotiable Instrument Law, neverthless, under Section 16 of that law (KRS 356.016) (App., p. 29, *infra*) non-delivery was no defense because valid delivery was conclusively presumed, despite the provisions of the statute under which the bonds were authorized declaring that they should have the qualities of negotiable instruments under the Law Merchant when in the hands of a bona fide holder (Tr. 500-506). On the basis of those holdings, the Court of Appeals (a) affirmed the judgment of the District Court (with certain modifications not important here), and (b) remanded the cause for further proceedings in connection with the receivership. Tr. 508.

10. Erlanger filed its Petition for Rehearing (a) asserting (i) that the provisions of the law merchant and not those of the NIL must be applied to determine the validity of the bonds, and particularly the availability of the defense of non-delivery, and, (ii) that under the Law Merchant the bonds sued on were wholly void because they were never delivered by Erlanger; and (b) requesting that the Court of Appeals stay further proceedings in the federal courts until an authoritative state court decision could be obtained as

to the application and effect of the law merchant in respect of the bonds sued on. Tr. 509-550.

11. Shortly after Erlanger filed its Petition for Rehearing, Weil-Roth, despite the fact that the decision of the Court of Appeals was in its favor, petitioned for a rehearing, asking the Court of Appeals to find that Erlanger had in fact actually authorized delivery of the bonds. Tr. 554-560.

12. The Court of Appeals denied both Petitions for Rehearing (Tr. 563).

II.

JURISDICTIONAL STATEMENT

The statutory provision believed to sustain the jurisdiction of this Court is §1254 (1) of Title 28 of the United States Code. The Court of Appeals denied Erlanger's Petition for Rehearing on September 15, 1953, (Tr. 563), and the date of the Petition for Certiorari is October 27, 1953.

III.

QUESTIONS PRESENTED

1. Under the Negotiable Instruments Law adopted by Kentucky in 1904 (1904 Acts ch. 102), Erlanger's sewer revenue bonds were *not* negotiable instruments, because, being payable only from a designated fund, they were not unconditional promises to pay (Carroll's Ky. Stats. (1936) §§3720b-1 and 3720b-3) (App.,

pp. 28-29, *infra*). In 1926 (twenty-two years after Kentucky adopted the NIL, Kentucky's legislature authorized the issuance of municipal sewer revenue bonds such as those sued on, but provided specifically that in the hands of bona fide holders such bonds would have "all the qualities of negotiable instruments *under the law merchant*." Are the rights of a holder of Erlanger's sewer revenue bonds governed by (a) the Negotiable Instruments Law or (b) the Law Merchant, under which the bonds are wholly void?

2. The Court of Appeals for the Sixth Circuit was called upon to determine (a) the validity of certain Kentucky municipal revenue bonds, and (b) the necessity for appointing a receiver to take over, manage and operate all the sanitary sewer system properties of a substantial Kentucky municipality. The validity of the bonds and the necessity for the appointment of a receiver turned upon an important question of Kentucky public law never decided by any Kentucky Court. Should not the Court of Appeals have stayed further proceedings in the federal courts until an authoritative decision could be obtained from Kentucky's highest court on the crucial question of Kentucky law?

IV.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. By (a) applying to Kentucky sewer revenue bonds a Kentucky statute (NIL) which Kentucky's highest court had determined does *not* apply to revenue bonds, and (b) refusing to apply to such bonds the Kentucky statute specifically applicable to them, the Court of Appeals for the Sixth Circuit decided an important question of Kentucky public law in flagrant disregard of the specific provisions of that law.

2. The case involves an important problem in federal procedure: Under what circumstances should federal court proceedings be stayed to permit the parties to secure an authoritative determination of state law? The decision of this case involves (a) the possession, management and operation of all the sanitary sewer system properties of a substantial Kentucky municipality, and (b) a liability of all the users of those sanitary sewer system properties; and turns on a question of Kentucky law never decided by Kentucky's courts. Necessarily, the litigation presents a delicate question in the relations between the federal courts and the state. This Court should review the decision below, both to decide this case correctly and to assist the lower federal courts in dealing with this unsettled and troublesome question of federal procedure.

WHEREFORE, your petitioner prays (1) that a writ of certiorari issue under the seal of this Court,

directed to the United States Court of Appeals for the Sixth Circuit, commanding said court to certify and forward to this Court a full and complete transcript of the record and of the proceedings of the said Court of Appeals had in the case numbered and entitled on its docket, No. 11656, City of Erlanger, Appellant, v. Berkemeyer, *et al,* Appellees, so that this cause may be reviewed and determined by this Court; (2) that the judgment of said Court of Appeals be reversed by this Court; and (3) for such other relief as to this Court may seem proper.

CHAS. I. DAWSON,
Attorney for Petitioner,
City of Erlanger.

RUCKER TODD,
ERVIN L. BRAMLAGE,
RALPH P. RICH,
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Brief in Support of Petition for Writ of Certiorari

I.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit (Tr. 497-508) is reported in 204 F. 2d 567.

II.

JURISDICTION

1. The statutory provision believed to sustain the jurisdiction of this Court is 28 U.S.C. §1254(1).

2. The Court of Appeals denied Erlanger's Petition for Rehearing on September 15, 1953. Tr. 563.

III.

STATEMENT OF THE CASE

1. Under the authority of a Kentucky statute (Carroll's Ky. Stats. (1936) §2741L) (App., pp. 27-28, *infra*) the Town of Erlanger, Kentucky, on March 5, 1936, through its Board of Trustees (Town Council), by ordinance authorized the preparation and the execution, but not the sale or delivery, of an issue of sewer revenue bonds to be paid exclusively from the revenue to be derived from the operation of the sewer system. D. Ex. 1, Tr. 95-96, 382-83; P. Ex. 14, Tr. 154-155, 231-32, 295-310. The statute under which Erlanger proceeded in respect of the authorization of the bonds provided that the bonds shall have "in the hands of bona fide holders all of the qualities of negotiable instruments *under the law merchant.*" Carroll's Ky. Stats. (1936) §2741L-5 (App., pp. 27-28, *infra*).

2. The bonds were printed and signed. Tr. 163-64.

3. On June 4, 1936, without any authority so to do, Erlanger's City Attorney (a) fabricated and certified (i) a resolution authorizing delivery of all the bonds ($150,000) to Hector Coolsaet, a contractor, and (ii) minutes of a meeting of Erlanger's Board of Trustees purporting to show adoption of the false and fabricated resolution; (b) swore to and signed a false affidavit stating that the false and fabricated resolution had been properly posted; and (c) prepared and secured execution of a receipt falsely stating that Coolsaet had received all the bonds ($150,000). With-

out any authority so to do, the City Attorney did give Coolsaet some twenty-five of the $1000 bonds. P. Ex. 14, Tr. 154-155, 231-32, 322-329; Tr. 214, 223-225, 227.

4. As shown (a) by Erlanger's minutes [all of which were available (Tr. 451), in chronological order (Tr. 451), on consecutively numbered pages (Tr. 451)], and (b) by Erlanger's mayor, neither the false and fabricated resolution, nor any other resolution authorizing delivery of all or any part of the bonds to Coolsaet was ever introduced or passed in Erlanger's legislative body. Tr. 98-99, 163-164.

5. Peck, Shaffer and Williams, a Cincinnati law firm, addressed to Coolsaet an opinion letter dated June 5, 1936, stating that the sewer revenue "bonds and interest coupons are valid and binding special obligations of the Town of Erlanger, Kentucky." P. Ex. 15, Tr. 153-154, 335-36. The false and fabricated resolution, minutes, affidavit and receipt were introduced at the trial in this cause through Mr. Frank H. Shaffer, Jr. of Peck, Shaffer and Williams in connection with his firm's June 5, 1936, opinion letter (Tr. 152-156), although (a) the June 5, 1936, opinion letter did not refer specifically to the false and fabricated resolution, minutes, affidavit or receipt, (b) the record does not disclose when Peck, Shaffer and Williams received the false and fabricated resolution, minutes, affidavit and receipt (Tr. 152-156, 228-230), and (c) the City Attorney was not the proper official to certify Erlanger's resolutions or minutes (Carroll's Ky. Stats. (1936) §§3684 and 1629).

6. Beginning in June, 1936, with the delivery of some twenty-five bonds to Coolsaet, Erlanger's City Attorney, acting wholly without authority, delivered sewer revenue bonds to various persons. For those bonds, the delivery of which Erlanger had *not* authorized, Erlanger received not one iota of consideration. Tr. 109, 213.

7. Five of the sewer revenue bonds handed to Coolsaet by the City Attorney were delivered by Coolsaet to John G. Exterkamp in about 1936 in payment of a private debt, the amount of which is not shown in the record. Tr. 91, 166, 246-247.

8. In 1936 and early 1937 the City Attorney, acting wholly without authority, handed some twenty-two of the $1000 bonds to Theodore Zumstein and D. W. Smith. Tr. 213, 216. Zumstein and Smith (a) during December, 1936, and February, 1937, pledged seven of the bonds to the Fort Thomas Bank, Fort Thomas, Ky., as security for personal loans (P. Ex. 5, Tr. 136-37, 266-67; 212-213), and (b) on April 22, 1937, sold two of the bonds to the Fort Thomas Bank (P. Ex. 6, Tr. 139-140, 268-269).

9. Erlanger paid for its sanitary sewer system without using the bonds or any proceeds thereof. It paid for the sewer system (a) in part from the proceeds of a general bond issue of $40,000, payable out of tax revenues and voted by the people of Erlanger (Tr. 107), (b) in part by an assessment of $33,015.92 against the users of the sewer system (Tr. 110), (c) in part

from borrowed funds (Tr. 107), and (d) in part with money donated by WPA and PWA (Tr. 107, 108).

10. In 1942 the five bonds delivered by Coolseat to John G. Exterkamp in about 1936 passed by inheritance to John D. Exterkamp. Tr. 87.

11. In 1945 The Weil, Roth & Irving Company, a Cincinnati, Ohio, municipal bond house (Tr. 76), bought the nine bonds from the Ft. Thomas Bank (Tr. 81, 159), although (a) four of those bonds had then matured (Tr. 77-79, 82), (b) all those bonds bore unpaid interest coupons dating back to 1937 (Tr. 83), and (c) Weil-Roth knew that Erlanger had disclaimed liability on the bonds (Tr. 84).

12. Five years later, in 1950, Raymond J. Berkemeyer (represented by Mr. Frank H. Shaffer, Jr. and Peck, Shaffer and Williams) brought suit against Erlanger in the United States District Court for the Eastern District of Kentucky on the bonds which Weil-Roth had bought from the Ft. Thomas Bank. Tr. 1-7. Thereafter, in a verified Amended Complaint, Weil-Roth (represented by Mr. Frank H. Shaffer, Jr. and Peck, Shaffer and Williams) appeared as a party, acknowledging that Berkemeyer was a "nominal holder" of the bonds "for the purpose of this suit" but alleging that Weil-Roth had purchased the bonds "in good faith for value.*" Tr. 29-36. On September 25, 1950, John D. Exterkamp intervened in the action Tr. 44-47.

*Despite this allegation, the District Court excluded evidence to show that Weil-Roth had paid but $1 for each of its nine $1000 bonds. Tr. 161.

13. Although the District Court [which heard the case without a jury (Tr. 61)] recognized that under Kentucky law a municipality can speak only through its records and that the minutes of the Erlanger legislative body were all available on consecutively numbered pages (Tr. 448-452), the District Court nevertheless concluded that the false and fabricated resolution and minutes established Erlanger's authorization of delivery of the bonds! Tr. 442-445.

14. On March 26, 1952, the District Court (a) as to Weil-Roth entered (i) Findings of Fact (Tr. 472-480), (ii) Conclusions of Law (Tr. 480-482), and (iii) a Judgment, to be paid from the sewer system revenues, in favor of Weil-Roth for the $1000 face amount of each matured bond and the $30 face amount of each due coupon together with 6% interest from each coupon's due date (Tr. 482-484); (b) as to Exterkamp, entered (i) Findings of Fact and Law (Tr. 466-471), and (ii) a Judgment, to be paid from sewer system revenues, in favor of Exterkamp for the $30 face amount of each due coupon together with 6% interest from each coupon's due date (Tr. 472); and (c) appointed a receiver to take over, manage and operate Erlanger's sanitary sewer system properties (Tr. 485-488).

15. From those Judgments of the District Court, Erlanger appealed to the United States Court of Appeals for the Sixth Circuit. Tr. 488.

16. The Court of Appeals in its May 11, 1953, Opinion (Tr. 497-508) (a) agreed that Weil-Roth and

Exterkamp had failed to prove an authorized delivery of the bonds by Erlanger, because Erlanger could speak only through and be bound only by its records, and (b) conceded that under the express provisions of the NIL the bonds were not negotiable instruments within that law. Nevertheless, the Court of Appeals held that, since Weil-Roth and Exterkamp had the rights of bona fide holders, NIL §16 (KRS 356.016) (App., p. 29, *infra*) applied a conclusive presumption that the bonds had been validly delivered by Erlanger. So far as the Court of Appeals Opinion discloses, the Court gave no consideration at all to the facts (a) that the statute under which the bonds were authorized provides *specifically* that they shall have "in the hands of bona fide holders all the qualities of negotiable instruments *under the law merchant", not* the qualities of negotiable instruments under the Negotiable Instrument Law, and (b) that under the Law Merchant an instrument never delivered by its maker is wholly void, even in the hands of a bona fide holder.

17. On July 22, 1953, Erlanger filed its Petition for Rehearing (Tr. 509-550) in which it (a) asked that the Opinion be withdrawn and demonstrated (i) that rights under the bonds were governed by the Law Merchant, and (ii) that under the Law Merchant an originally undelivered instrument was wholly void, even in the hands of a bona fide holder; and (b) asked that the Court of Appeals remand the case to the District Court with instructions to stay further proceedings until an authoritative decision could be secured

from Kentucky's highest court on the proper application of the Law Merchant to rights under the bonds.

18. On July 31, 1953, nine days after Erlanger's Petition for Rehearing was filed, Weil-Roth filed a Petition for Rehearing (Tr. 554-560) asking the Court of Appeals to find that the false and fabricated resolution and minutes did establish a valid delivery of the bonds by Erlanger.

19. Apparently through an editorial mistake by West Publishing Company the May 11, 1953, Opinion of the Court of Appeals was inadvertently published in the Federal Reporter (Second Series) Advance Sheet dated August 3, 1953, (204 F. 2d 567).

20. On September 15, 1953, the Court of Appeals entered an Order denying Erlanger's Petition for Rehearing and Weil-Roth's Petition for Rehearing. The Order stated simply that the Petitions were denied, citing only "*Wettlaufer* v. *Baxter,* 137 Ky. 362, 367-368; *Young* v. *Exchange Bank of Ky.,* 152 Ky. 293, 302; *Gannon* v. *Bronston,* 246 Ky. 612, 620, 625." Tr. 563.

IV.

SPECIFICATIONS OF ERROR

1. The United States Court of Appeals for the Sixth Circuit committed error in holding that §16 of the Negotiable Instruments Law denied Erlanger the benefit of the defense of original non-delivery, despite the facts that (a) the bonds sued on were not negotiable instruments under the Kentucky Negotiable Instruments Law, (b) the Court of Appeals of Kentucky has held her Negotiable Instruments Law does not apply to instruments made non-negotiable under its provisions, and (c) the Kentucky statute under which the bonds were issued expressly provides that the qualities of those bonds shall be determined by the Law Merchant, under which original non-delivery is a complete defense.

2. The United States Court of Appeals for the Sixth Circuit committed error in failing and refusing to remand the case to the District Court with instructions to stay all further proceedings therein until an authoritative decision could be obtained from Kentucky's highest court on the question involved, which is peculiarly and exclusively one of state law and of state public policy.

V.

THE ARGUMENT

A.

By (a) applying to the bonds sued on a statute (NIL) which Kentucky's highest Court has determined does *not* apply to such bonds, and (b) refusing to apply to those bonds a statute specifically applicable to them, the Court of Appeals decided an important question of Kentucky public law in flagrant disregard of the specific provisions of that law.

(a) The question is important.

Two factors show the importance of the question which the Court of Appeals decided in flagrant disregard of Kentucky law:

First, there is the fact that the statutory provision involved in this case applies not only to the bonds here involved but as well to many other types of revenue bonds. Time and again, in separate statutes, Kentucky's legislature has expressly declared, through the same language that applies to Erlanger's sewer revenue bonds, that revenue bonds shall "have in the hands of bona fide holders all the qualities of negotiable instruments *under the law merchant.*" And this, notwithstanding the fact that at the date of enactment of each of those statutes, as well as at the date of enactment of the statute authorizing the issuance of the bonds sued on, the NIL had long been on the statute books of the state.

For example: (a) public building revenue bonds (Carroll's Ky. Stats. (1936) §4535 m-4); (b) recreation

project revenue bonds (Carroll's Ky. Stats. (1936) §2741p-18 (1940 Supp.)); (c) water district revenue bonds (Carroll's Ky. Stats. (1936) §938g-30); (d) electric light, heat and power plant revenue bonds (Carroll's Ky. Stats. (1936) §3480d-5); (e) law school building revenue bonds (Carroll's Ky. Stats. (1936) §2948c-5 (1939 Supp.)); and (f) sanitary district revenue bonds (Carroll's Ky. Stats. (1936) §2062g-41 (1940 Supp.)). See Tr. 521-524.

Thus, the statutory provision making the Law Merchant—not the NIL—govern rights under public revenue bonds is an established part of Kentucky public policy, making available to the governmental agency issuing each such bond the defense of original nondelivery. The decision in this case will doubtless affect many other issues of revenue bonds and flout the public policy of Kentucky declared in repeated legislative enactments.

In the second place, the decision in this case is important because of its impact in this case itself. If the decision of the Court of Appeals is permitted to stand, an onerous liability is fastened upon the sewer users of Erlanger who will have to pay twice for their sewer system and see their sewer system taken over and operated and managed by a receiver from the federal courts.

(b) The decision below is demonstrably wrong.

Our position in the Petition for Rehearing before the Court of Appeals, and here, is simple and direct:

1. The NIL could not apply to Erlanger's sewer revenue bonds of its own force because, being revenue bonds, they were not unconditional promises to pay and accordingly were not negotiable instruments under the NIL;

2. The Kentucky statute which authorized the sewer revenue bonds specifically made the Law Merchant govern rights under the bonds, instead of the NIL;

3. Under the Law Merchant a negotiable instrument never delivered by its maker is *wholly void;* and

4. Therefore the bonds were *wholly void,* for they were never delivered by Erlanger.

The Court of Appeals had agreed that the bonds could not qualify as negotiable instruments under the NIL because they were not unconditional promises to pay. Tr. 500. And the Court of Appeals had correctly recognized that the bonds were governed by the statutory provision that they should "have in the hands of bona fide holders all the qualities of negotiable instruments *under the law merchant.*" Tr. 501.

However, without any discussion of (a) possible differences between the Law Merchant and the NIL, or (b) the possibility that Kentucky's legislature meant "Law Merchant" when it said "Law Merchant," the Court of Appeals had proceeded to apply the NIL to Erlanger's sewer revenue bonds. Tr. 505-506. The bitter truth seems to be that the Court of Appeals failed to perceive the crucial significance of the term "Law Merchant" because it failed to perceive that there was

a radical difference between the provisions of the Law Merchant and the NIL as to an instrument never delivered by its maker.

Thus Erlanger's Petition for Rehearing brought before the Court of Appeals the all-important considerations which the Court of Appeals had evidently not previously perceived.

We state candidly that we do not know upon what grounds the Court of Appeals denied the Petition for Rehearing. In the Order denying Erlanger's Petition for Rehearing, the Court cited three Kentucky cases, indicating in each citation the pages thought relevant to the denial. Tr. 563. The most than can be gleaned from those citations is that Kentucky's highest Court has said several times that the Negotiable Instruments Law is "with few exceptions" merely a "codification" (137 Ky. at 367) (246 Ky. at 625) and that the NIL was not prepared "with a view of making any radical changes" (137 Ky. at 367) or "to depart from any settled and sound principles of commercial law" (152 Ky. at 303).

Possibly the Court of Appeals was trying to say that when Kentucky's legislature said "Law Merchant" it meant "Negotiable Instruments Law." Or perhaps it was trying to say that the rule of the Law Merchant with regard to undelivered instruments was the same as Section 16 of the Negotiable Instruments Law. Whichever it was trying to say, the Court of Appeals was patently wrong.

In our Petition for Rehearing, we demonstrated that on any proper construction of the governing stat-

ute, the Law Merchant—not the NIL—applies to the bonds. That demonstration is set forth at pages 518-524 of the Transcript and need not be repeated here.

Similarly, in Erlanger's Petition for Rehearing, we carefully examined and analyzed the pre-NIL decisions dealing with originally undelivered instruments and showed that before the NIL an instrument never delivered by its maker was wholly void. Tr. 528-544. We concluded our argument by showing that Dean James Barr Ames had regarded NIL §16 as working a "startling" change in the law. Here we shall add but a single authority. In 1904, the year in which Kentucky adopted the NIL, Charles M. Lindsay of the Louisville bar prepared a small treatise entitled "The Negotiable Instruments Law of Kentucky." At page 14, Mr. Lindsay had this to say of NIL § 16:

> "Thus, one who has signed a negotiable instrument complete on its face is liable thereon to a holder in due course, although it was never delivered by him, but lost by him, or stolen from him, or even from someone else after his death. *This provision has radically changed the law.*"

So we say to this Court that the Court of Appeals decision is wrong—and demonstrably wrong; that the question of state law is an important one; and that this Court should grant a writ of certiorari to review the decision.

This Court's potential power of review is the ultimate assurance that every question will receive full

and fair consideration by the lower federal courts. Unwise it would be for this Court in the press of its certiorari business to ignore its essential function of requiring that the lower federal courts treat each contention fairly, even if fairness leads to embarrassment.

B.

The case involves the important question in federal procedure of whether the Court of Appeals should have stayed further proceedings in the federal courts until an authoritative decision could be obtained in the state courts, thereby avoiding possible unseemly federal-state divergences.

In its Petition for Rehearing, Erlanger requested the Court of Appeals to remand the case to the District Court, directing that further proceedings in the federal courts be stayed until an authoritative decision could be obtained from Kentucky's highest court on the proper application of the Law Merchant to the bonds. Tr. 546-549. The Court of Appeals ignored that suggestion in denying Erlanger's Petition for Rehearing. Tr. 563.

As frequently suggested [*e. g.*, Note, *The Pullman Case: A Limitation on the Business of the Federal Courts,* 54 Harv. L. Rev. 1379 (1941)], the federal courts should work out arrangements under which matters primarily of state concern can be determined by the state courts. One excellent device is to stay federal court proceedings until a decision can be obtained in the state courts determining the proper construction of a state statute.

We shall not now attempt to interpret for this Court this Court's own decisions dealing with that device. A number of them are cited and discussed in Erlanger's Petition for Rehearing (Tr. 547-548). But we shall show that this case is an appropriate one for the use of that device.

The case necessarily involves a conflict between the federal courts and one of Kentucky's political subdivisions. The federal courts are called upon to decide an important question of Kentucky's public law, one which has never been decided by the Kentucky courts. Under the decisions below a receiver appointed by the federal courts will take over, manage and operate all of Erlanger's sanitary sewer system properties. The receiver appointed by the federal courts will collect from Erlanger's inhabitants sewer rentals to pay a liability on bonds for which Erlanger and its citizens never received one jot or title of consideration. They will have to pay that liability because the federal courts have denied them a defense expressly given them by Kentucky's legislature.

The case is in the federal courts only because of diversity of citizenship. If in state court litigation involving other bond issues it were determined—as we confidently assert it would be—that originally undelivered revenue bonds such as Erlanger's sewer revenue bonds are wholly invalid, there would indeed be an unseemly divergence between the state and federal courts. The federal courts would suffer unnecessarily from a self-inflicted wound.

The federal courts should be astute to avoid such unseemly federal-state divergences and self-inflicted wounds. Yet certainly not in every case that presents a tough state law question should the federal courts stay proceedings. Against the gravity of the conflicts, divergences and wounds must be weighed the delay and expense to the litigants. A difficult task. And this Court has given the lower federal courts but little help in the execution of the task.

We submit that this Court should grant a writ of certiorari to determine upon the facts of this case that federal court proceedings should be stayed until an authoritative state decision can be secured. Only by thus pricking out from case to case the boundaries of the area within which the federal courts should defer to the state courts can this Court discharge its important function of leading the lower federal courts through the difficult maze of state and federal relations.

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Attorney for Petitioner,
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RUCKER TODD,
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Of Counsel.

October 27, 1953.

APPENDIX.

1.

Carroll's Kentucky Statutes (1936) Sections 2741L-1, 2741L-2 and 2741L-5.

"§2741L-1. **Second, third, fourth, fifth and sixth class cities may acquire, operate and maintain waterworks and sewerage system.**—That cities of the second, third, fourth, fifth and sixth class whether organized under the general law or special charter law, and including such cities where the commission form of government has been adopted, are hereby authorized and empowered to purchase, establish, erect, maintain and operate water works and/or sewerage system, and necessary appurtenances thereto, within or without the corporate limits under the provisions of this Act, for the purpose of supplying such city or town and inhabitants thereof with water and/or sewerage system."

"§2741L-2. **Bond issue; ordinance to be adopted.**—For the purpose of defraying the cost of acquiring any such water works and/or sewerage system, either by purchase or construction, and appurtenances or extensions thereto, such city may borrow money and issue negotiable bonds, provided no such bonds shall be issued unless and until authorized by an ordinance specifying the proposed undertaking, the amount of bonds to be issued and the maximum rate of interest such bonds are to bear, which shall not be more than six per cent (6%) per annum."

"§2741L-5.—**Negotiable instruments; tax free; sale of bonds; delivery in part of purchase price; net interest yield; payable only from water revenues.**—Any and all such bonds shall have and are hereby declared to have in the hands of bona fide holders all of the qualities of negotiable instruments under the law merchant, and shall not be subject to taxation. In case any of the officers whose signatures or counter signatures appearing on the bonds or coupons shall cease to be such officers before the delivery of such bonds, such signatures or counter signatures shall nevertheless be valid and sufficient for all purposes the

same as if they had remained in office until such delivery. Such bonds shall be sold in such manner and upon such terms as the common council or board of commissioners shall deem for the best interests of such city, or any contract for the purchase or acquisition of any water works may provide that payment thereof shall be made in such bonds. In no event shall any bonds be negotiated on a basis to yield more than six per cent. Such bonds when issued shall be payable solely from the revenue funds derived from such water works as provided in § 27411-9 hereof and shall not constitute an indebtedness of such city within the meaning of the constitutional provisions or limitations. It shall be plainly stated on the face of each bond that same has been issued under the provisions of this act and it does not constitute an indebtedness of such city within the meaning of any constitutional provisions or limitations."

2.

Carroll's Kentucky Statutes (1936)
Sections 3720b-1 and 3720b-3.

"**§3720b-1. Requirements of a negotiable instrument.**—An instrument to be negotiated must conform to the following requirements:

(1) It must be in writing and signed by the maker or drawer.

(2) Must contain an unconditional promise or order to pay a sum certain in money.

(3) Must be payable on demand or at a fixed or determinable future time.

(4) Must be payable to the order of a specified person or to bearer; and

(5) Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty."

"**§3720b-3. Unqualified order is unconditional.**—An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with it:

(1) An indication of a particular fund, out of which reimbursement is to be made, or a particular account to be debited with the amount; or

(2) A statement of the transaction which gives rise to the instrument.

But an order or promise to pay out of a particular fund is not unconditional."

3.

Kentucky Revised Statutes (1953) 356.016.

"**356.016 Delivery; when effectual; when presumed.**— Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting, or endorsing as the case may be; and in such case the delivery may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 444

CITY OF ERLANGER, KENTUCKY,

Petitioner,

v.

RAYMOND J. BERKEMEYER, THE WEIL, ROTH & IRVING COMPANY, JOHN D. EXTERKAMP,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Brief for Respondents, Raymond J. Berkemeyer and The Weil, Roth & Irving Company, in Opposition

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I. OPINIONS BELOW

The opinion of the District Court (as given from the bench—R. 436-466) is not reported. The opinion of the United States Court of Appeals for the Sixth Circuit (R. 497-508) is reported in 204 F. (2d) 567.* That Court's citations given in connection with the order denying the petitions for rehearing (R. 563) are not reported.

II. JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

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* Advance sheets only; deleted from bound volume.

III. STATEMENT OF THE CASE

Petitioner, in its Statement of the Case, would lead the Court to believe that many of its contentions were found to be facts by the Trial Court and upheld by the Court of Appeals. Nothing could be further from the truth.

The paragraph numbered "3" and following paragraphs of Petitioner's Statement (p. 10) refer to a "false and fabricated" resolution authorizing the delivery of the bonds (though admittedly a resolution authorizing the bond issue was adopted). On the contrary, the District Court found that this "delivery" resolution was and is a resolution of the Town (now City) of Erlanger and that the "record of this resolution . . . has in some unexplained manner disappeared from the records . . ." (Findings of Fact, Par. 7, R. 476-7).

Moreover, the Court found that certified copies of the entire proceedings relating to the bonds were delivered to this law firm, Peck, Shaffer & Williams, "for the purpose of obtaining of that firm its legal opinion as to the validity of the bonds" (Findings of Fact, Par. 9, R. 477). Contrary to Petitioner's assertion (p. 11) that the record does not disclose when Peck, Shaffer & Williams received those copies, at page 154 thereof it was testified that Mr. Victor, the Town Attorney, delivered them for the purpose of obtaining the validity opinion.

Quite obviously Petitioner wishes this Court to weigh the evidence. However, the District Court has carefully considered the matter and we refer the Court not only to its opinion delivered from the bench (R. 436-466) but also to its Findings of Fact (R. 472-480) and Conclusions of Law (R. 480-482) as they relate to these respondents.

The Court of Appeals also wrote a detailed opinion (R. 497-508) which affirmed the judgment of the District Court in all but one respect. That exception was that the record of the resolution authorizing delivery of the bonds was

held to be inadmissible (R. 500). The Court's reasoning was that since the record for that day was available, it could not be supplemented under the "best evidence rule." Thus the Court of Appeals accepted the District Court's finding that the missing record had disappeared but defeated its admission into evidence on a technicality—the best evidence rule. We did and do not believe that the law is, as stated in effect by the Court of Appeals, that, if a municipality's record of proceedings for a given day are *wholly* destroyed, secondary proof thereof may be introduced, but if it is only *partially* destroyed, no such secondary proof may be made. Accordingly, we filed a petition for rehearing, which the Court of Appeals overruled without opinion. Since a correct basis for a reduced judgment still remains and since our claimed error rests on a wholly isolated misconstruction of local law, we did not petition for a writ of certiorari. We submit that Petitioner's contention is of a similarly isolated nature, with the added and insurmountable barrier that it is wrong as to its interpretation of the local law.

IV. THE QUESTION PRESENTED

The question presented is whether, assuming no valid original delivery by the Town (now City) of Erlanger, these Respondents have the rights of the Bank of Fort Thomas which was a holder in due course. The enabling statutes for these bonds provided that they would have "all the qualities of negotiable instruments under the law merchant" (Sec. 5 of Chap. 92 of the Acts of Kentucky of 1930) and termed them "negotiable bonds" (Sec. 2 of Chap. 81 of the Acts of Kentucky of 1936). If sections 16 and 58 of the Negotiable Instruments Law of Kentucky (pp. 218 and 225 of the Acts of Kentucky of 1904) apply, as the District Court and the Court of Appeals held, clearly the judgment is correct. Section 16 provides that "Where an

instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed." Section 58 is to the effect that "a holder who derives his title through a holder in due course . . . has all the rights of such former holder in respect of all parties prior to the latter."

V. SUMMARY

Petitioner has submitted two contentions: First, that the "NIL" does not apply to the bonds sued on according to Kentucky law; and second, that the proceeding should be stayed pending a determination by Kentucky courts as to the application of the NIL to the facts herein. We shall demonstrate that under Kentucky law the NIL does apply to these bonds and that the Court of Appeals below has decided the question of local law exactly in accordance with local decisions. Thus, it is unnecessary to reach the second contention.

VI. ARGUMENT

Clearly Petitioner's two contentions are inconsistent with each other. If Kentucky law is as clear as it argues, then there is no need to stay proceedings to let Kentucky courts repronounce that same law.[1]

However, the fact is that Kentucky law is clear on the question but contrary to that argued for by Petitioner. Kentucky law is that the NIL in Kentucky provides the same rules as the law merchant.

The NIL, as its beginning is described in *Gannon* v. *Bronston*, 246 Ky. 612, 55 S. W. (2d) 358, did not seek to alter the common law or law merchant except to meet the

[1] It is perhaps a sufficient comment that, assuming the incorrectness of the Court of Appeals' construction of Kentucky law, the decision is of no importance to other litigants throughout the country. We do not believe that it is necessary for this Court to spell out *Erie* v. *Tompkins* in unimportant and unrepresentative cases.

exigencies of conflicting rules in various jurisdictions. At page 364 (S. W.) the Court stated:

> "These opinions show that *this court regards the Negotiable Instruments Law, not as something new or revolutionary, but rather as a codification, a compilation, or a restatement of the law as it was.*" (Italics added.)

At page 365 it stated:

> "By section 3720b-195, Ky. Stats., all laws inconsistent with the Negotiable Instruments Law are repealed. That not only repeals such statutes, but also destroys the force of inconsistent judicial opinions. . . ."[2]

Thus, the reference in Section 5 of Chapter 92 of the Acts of 1930 to "negotiable instruments under the law merchant" and the reference in Section 2 of Chapter 81 of the Acts of 1936 (page 245) to "negotiable bonds" is clearly to such as codified under the NIL. Indeed, if Kentucky law prior to the enactment of the NIL was contrary to said Sections 16 and 58 thereof, clearly that law was repealed thereby. Indeed, the Legislature cannot re-enact by reference something that has once been repealed.

Petitioner questions the application of any of the provisions of the NIL to these bonds. However, just as the legislature is competent to enact an NIL covering certain types of instruments, so too it is competent to class other instruments as negotiable with all the attendant consequences.

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[2] Significantly, by Section 195 of the NIL (page 252 the Acts of Kentucky of 1904) "all laws inconsistent with this act are hereby repealed." Of equal importance is the fact that the so-called "Uniform Act" contained "Section 196 (cases not provided for in Act). In any case not provided for in this act the rules of the law merchant shall govern"; this provision was not included in the Kentucky Act.

Indeed, it would surely be an anomalous situation to have both the NIL and the law merchant currently give two different results as to municipal bonds that were otherwise similar. If this were so, as stated in *City of Newport Richey* v. *Fidelity and Deposit Company*, 105 F. (2d) 348 at 350,

> ". . . the negotiability of commercial paper would be greatly hindered, since in every case one would need to inquire about delivery by the maker and by each indorser before he could be safe. . . ."

Petitioner's only Kentucky authority in answer to *Gannon* v. *Bronston*, supra, and the other cases cited by the Court of Appeals, is not a Kentucky judicial decision, as suggested by subdivision 5(b) of Rule 38 of this Court, but a footnote in a treatise prepared in 1904 by a Charles M. Lindsay of the Louisville bar. A description of Sec. 16 is quoted therefrom (Petition p. 22) ending with an opinion that this "provision has radically changed the law." However, authority (which was omitted by Petitioner) for this statement is not Kentucky law but several then current treatises on bills and notes. One of these, Eaton and Gilbert on Commercial Paper, recites at page 260:

> "As a general rule possession of a promissory note or bill of exchange implies delivery. According to the preponderance of authority, one who has purchased for value in good faith, in the usual course of business, and before maturity, a negotiable instrument complete upon its face, and not voided by forgery or statutory prohibition, has good title in the person from whom he took it, even though such person may have acquired it by fraud, by theft, or by robbery. *The rule as declared in the Negotiable Instruments Law is clearly that of the law merchant*; . . ." (Italics added.)

Thus, Petitioner's own authority does not stand close examination.

Since the Court of Appeals has decided this question of local law exactly in accordance with local decisions, subdivision 5(b) of Rule 38 indicates that the writ should be denied.

VII. CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

Frank H. Shaffer Jr.

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The WEIL, ROTH & IRVING COMPANY.

PECK, SHAFFER & WILLIAMS,
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Of Counsel.

November 23, 1953

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FILED
NOV 27 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1953

No. 444.

CITY OF ERLANGER, KENTUCKY,
Petitioner,

versus

RAYMOND J. BERKEMEYER,
THE WEIL, ROTH & IRVING COMPANY,
JOHN D. EXTERKAMP,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

REPLY TO BRIEF OF RESPONDENTS.

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November 25, 1953.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

CITATIONS.

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IN THE

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CITY OF ERLANGER, KENTUCKY,
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RAYMOND J. BERKEMEYER,
THE WEIL, ROTH & IRVING COMPANY,
JOHN D. EXTERKAMP,
Respondents.

REPLY TO BRIEF OF RESPONDENTS.

The Petition for Writ of Certiorari advanced two reasons why the Writ should be granted:

(1) The case presents an important question of Federal procedure which should be decided by this Court; and

(2) There is involved an important question of the public policy of the Commonwealth of Kentucky established by specific statute and by judicial decisions of that state, and that question was decided by the United States Court of Appeals for the Sixth Circuit in dis-

> regard of that public policy, that statute, and the decisions of the Court of Appeals of that state.

Respondents' brief does not directly challenge the proposition that there is presented an important question of Federal procedure which should be decided by this Court. It does not directly challenge the proposition that the case involves the public policy of Kentucky.

Instead of challenging either of those propositions, respondents content themselves with what may be regarded as a short brief on the merits. That brief is confined to two contentions:

> (1) that the Negotiable Instrument Law of Kentucky is in effect a codification of the Law Merchant; and that to the extent that the principles of the Law Merchant are inconsistent with the provisions of the Negotiable Instrument Law, the latter controls even though the statute under which the bonds in question were issued clearly provides to the contrary; and
>
> (2) that the statements of fact contained in the petition are not true.

The Neogtiable Instrument Law of Kentucky in its original form was enacted in 1904. The bonds involved here were authorized by an act of the Legislature enacted in 1926, as amended in 1930. *Carroll's Kentucky Statutes* (1936 Edition), Section 2741-L(1) to (20), both inclusive.

The Negotiable Instrument Law, in its original form and as it existed at the time of the enactment of

the statute under which the bonds here involved were authorized, and at the time those bonds were wrongfully put in circulation, provided that for an instrument to be negotiable under its provisions, same

> "must contain an unconditional promise or order to pay a sum certain in money" (Section 3720-b-1 (2), *Carroll's Kentucky Statutes,* 1936 Edition).

Section 3720-b-3 (2), *Carroll's Kentucky Statutes* (1936 Edition), provides:

> "An order or promise to pay out of a particular fund is not unconditional."

In addition to the provisions of Section 3720-b-3 (2) the Court of Appeals of Kentucky has expressly held that an instrument payable solely out of a special fund, such as revenue bonds, is not a negotiable instrument within the meaning of the Kentucky Negotiable Instrument Law. *Pulaski County* v. *Ben Hur Life Association,* 286 Ky. 119, 149 S. W. 747; *Moore* v. *Clines,* 247 Ky. 605, 57 S. W. 2d 509.

Of course, when the Legislature came to enact the statute authorizing the issue of sewer bonds such as those involved in this case, it could have provided that they should be negotiable instruments and subject to all of the provisions of the Negotiable Instrument Act (see *Pulaski County* v. *Ben Hur Life Association, supra*); but it did not do so. Instead, it provided that such bonds shall have

> "in the hands of bona fide holders all of the qualities of negotiable instruments under the law merchant" (Section 2741-L-5, *Carroll's Kentucky Statutes,* 1936 Edition).

Therefore, it is perfectly obvious that the bonds cannot be regarded as negotiable instruments under the Negotiable Instrument Law, and that the Legislature did not intend that they should be so regarded.

Section 16 of the Negotiable Instrument Law, in its original form and as it existed at the time the bonds here involved were prepared and without the consent of the City of Erlanger put in circulation, provided that when an instrument negotiable under its terms

> "is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed" (*Kentucky Revised Statutes* §356.016).

That is the section of the Negotiable Instrument Law that the United States Court of Appeals for the Sixth Circuit applied to the bonds here involved so as to deny the defense of original non-delivery, even though those bonds were not negotiable under that law, and notwithstanding the fact that the Court of Appeals of Kentucky, prior to the preparation of the bonds here involved, and prior to the time they were placed in circulation without the consent of the City of Erlanger, had held that no provision of the Negotiable Instrument Law applies to an instrument not negotiable under its terms. *Wettlaufer* v. *Baxter,* 137 Ky. 362, 125 S. W. 741 (decided in 1910). The Wettlaufer case has been cited with approval and followed in the subsequent cases of *Owings* v. *Rider,* 241 Ky. 756, 45 S. W. 2d 487; *Haggard* v. *Mutual Oil & Refining Co.,*

204 Ky. 209, 263 S. W. 745; and *Fields' Adm'r* v. *Perry County State Bank,* 214 Ky. 24, 282 S. W. 555.

So, it is perfectly obvious that the argument advanced by respondents in discussing the merits, to the effect that the United States Court of Appeals for the Sixth Circuit properly applied Section 16 of the Negotiable Instrument Law so as to deny to petitioner the defense of non-delivery, is without merit. When the United States Court of Appeals for the Sixth Circuit applied Section 16 of the Negotiable Instrument Law so as to deny to the City of Erlanger the defense of original non-delivery, it disregarded not only the statute of Kentucky, but the decisions of the Court of Appeals of that state; and in refusing to apply the provision of the Law Merchant so as to accord to the City of Erlanger the defense of original non-delivery, it disregarded another statute of Kentucky and the public policy of the state as exemplified by that statute.

A reference to the specific pages of the record cited in the Petition for Writ of Certiorari in support of the statements therein made is deemed a sufficient answer to the unjustified and ungracious charge made in the brief of respondents that the petition does not correctly state the facts.

In *State of Arkansas* v. *State of Texas* (decided November 16, 1953), 22 L. W. 4020, this Court again expressed its reluctance to decide an important question of state law in advance of an authoritative decision by the applicable state court in this language:

"Were we to undertake to resolve the questions we might find ourselves in conflict with the courts that have the final say."

Respectfully submitted,

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RALPH P. RICH,
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November 25, 1953.